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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON DEINER,

Defendant and Appellant.

E071193

(Super.Ct.No. FWV1400027)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dan Detienne,  
Judge. Conditionally reversed and remanded with directions.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General,  
Arlene A. Sevidal and Susan E. Miller, Deputy Attorneys General, for Plaintiff and  
Respondent.

Jason Deiner robbed two banks in the space of about four weeks. A jury convicted him of five counts of robbery, two counts of burglary, and one count of reckless evasion of a police officer. (Pen. Code,<sup>1</sup> §§ 211, 459; Veh. Code, § 2800.2.) The trial court found that he had five prior robbery convictions qualifying as prior serious felonies and prior strikes. (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d).) In total, the court sentenced him to prison for a determinate term of six years plus another 70 years to life.

On appeal, Deiner argues that we should remand for the court to consider (1) whether he qualifies for mental health diversion under section 1001.36 and (2) whether the enhancements for prior serious felony convictions should be stricken or dismissed in light of recent amendments to sections 667, subdivision (a)(1) and 1385. He also argues that, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), we should stay execution of the restitution fine and fees imposed at sentencing.

We conditionally reverse the judgment and remand with directions to consider whether Deiner qualifies for mental health diversion. If the court declines to order diversion, it shall consider whether to strike one or both of the prior serious felony enhancements. But we decline to remand for an ability to pay hearing. Any *Dueñas* error was harmless beyond a reasonable doubt.

## BACKGROUND

On the morning of December 9, 2013, a White man with blue eyes entered Security Bank in Redlands, California, and announced that he was robbing the bank. He

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<sup>1</sup> Further undesignated statutory references are to the Penal Code unless otherwise indicated.

had a black duffel bag in one hand and a gun in the other, and he said that he had a bomb in the bag. The man took cash from two bank employees and collected it in a pillowcase. He was wearing a black jacket, a dark-colored hat, and light-colored gloves. His face was partially covered by a black scarf.

On the morning of January 2, 2014, a White man with blue eyes entered School's First Federal Credit Union in Rancho Cucamonga, California, pointed a gun at an employee, and directed her to go towards the tellers. He handed her a pillowcase and demanded cash from two tellers. The employee holding the pillowcase collected the money. The man was wearing black boots, a black jacket, and a black hat. His face was partially covered by a black scarf or bandana. The man exited the credit union with the pillowcase of cash, and a bystander saw him drive away in a white Ford pickup truck.

About 15 minutes after the credit union robbery, officers in Ontario observed a white Ford pickup truck on the I-10 freeway. The driver was later identified as Deiner. The officers activated their lights and sirens to stop the truck after Deiner committed a traffic violation, but he did not stop. Instead, Deiner exited the freeway and led officers on a chase in which he ran numerous red lights, drove off the road to pass cars, sped up to 90 miles per hour, veered into oncoming traffic, and narrowly avoided colliding with other cars. Officers eventually stopped the chase with a "police intervention technique" and arrested Deiner. He was wearing black boots. Inside the pickup truck, investigators found a black jacket, a black beanie with the end cut off, a black hat, a pillowcase containing \$1100, a black canvas tool bag, a BB gun, and white latex gloves.

## DISCUSSION

### I. *Mental Health Diversion*

Effective June 27, 2018, the Legislature created a pretrial diversion program for defendants with qualifying mental disorders. (§§ 1001.35, 1001.36; *People v. Frahs* (2018) 27 Cal.App.5th 784, 789 (*Frahs*), review granted Dec. 27, 2018, S252220.) Section 1001.36 defines pretrial diversion as “the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . .” (§ 1001.36, subd. (c).)

Deiner argues that, because the judgment is not yet final, section 1001.36 applies retroactively in his case, and the trial court should determine whether he is eligible for mental health diversion. He raised the same argument at his sentencing hearing, which took place approximately two months after the effective date of section 1001.36. He asked the court to continue his sentencing so that he could retain an expert to examine him and show his eligibility. The court denied the request, ruling that section 1001.36 did not apply because the jury had already adjudicated Deiner’s case, and therefore it was too late for pretrial diversion. We agree with Deiner that section 1001.36 applies retroactively to his case.

The court may grant pretrial diversion under section 1001.36 if all of the following criteria are met: (1) The defendant suffers from an identified mental disorder. (2) The mental disorder was a significant factor in the commission of the charged offense.

(3) The defendant's symptoms would respond to treatment. (4) The defendant consents to diversion and waives his or her speedy trial rights. (5) The defendant agrees to comply with treatment. And (6) the defendant will not pose an unreasonable risk of danger to public safety if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).) The proceedings may be diverted for up to two years while the defendant is in treatment. (§ 1001.36, subd. (c)(3).) If the defendant performs satisfactorily in diversion, the court shall dismiss the charges. (§ 1001.36, subd. (e).)

In *Frahs*, the court held that section 1001.36 applies retroactively to cases not yet final on appeal. (*Frahs, supra*, 27 Cal.App.5th at p. 791.) *Frahs* relied on our Supreme Court's decisions in *In re Estrada* (1965) 63 Cal.2d 740 and *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299. Those cases permit an "inference of retroactivity" when the Legislature enacts "ameliorative changes to the criminal law," assuming that there are no indications of a contrary intent. (*Lara*, at pp. 308-309.) Under such circumstances, the ameliorative changes apply to any defendant whose judgment of conviction is not yet final at the time of enactment. (*Id.* at pp. 304, 307-309.) *Frahs* determined that the opportunity for diversion and dismissal under section 1001.36 was an "ameliorating benefit," and "the Legislature intended the mental health diversion program to apply as broadly as possible." (*Frahs*, at p. 791.) It followed that section 1001.36 applies to all cases not yet final on appeal. (*Frahs*, at p. 791.)

The People argue that *Frahs* was wrongly decided. Some courts have disagreed with *Frahs* and held that section 1001.36 does not apply retroactively, while others have

agreed with *Frahs*. (Compare *People v. Khan* (2019) 41 Cal.App.5th 460, 466, 488 [section 1001.36 does not apply retroactively], and *People v. Craine* (2019) 35 Cal.App.5th 744, 749-750, review granted Sept. 11, 2019, S256671 [same] with *People v. Burns* (2019) 38 Cal.App.5th 776, 786-788, review granted Oct. 30, 2019, S257738 [section 1001.36 applies retroactively to nonfinal cases on appeal], and *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1120-1122, review granted Oct. 9, 2019, S257049 [same].) Our Supreme Court is reviewing the issue and will resolve the split of authority. (*Frahs*, review granted Dec. 27, 2018, S252220.) Until that court holds otherwise, we conclude that *Frahs* represents the better reasoned approach.

Deiner’s judgment of conviction is not yet final, and the record contains some evidence that Deiner may have a mental health disorder. (See *Frahs*, *supra*, 27 Cal.App.5th at p. 791.) In his sentencing brief, Deiner said that he has suffered from severe “feelings of anxiety and depression” and has considered suicide at different times in his life. He asserted that he started abusing methamphetamine to help him deal with his anxiety and depression. He also explained that he suffered head trauma in a car accident as a teenager. His sentencing brief included a “biopsychosocial assessment” in which the author (a social worker) explained how possible traumatic brain injury might have impacted Deiner’s mental health. As in *Frahs*, the appropriate remedy is conditional reversal of the judgment and remand so that Deiner may have the chance to demonstrate his eligibility for mental health diversion. (*Id.* at p. 792.) If Deiner fails to demonstrate his eligibility, his convictions shall be reinstated. (*Ibid.*)

The People argue that Deiner has failed to demonstrate his eligibility for mental health diversion, and we therefore should not remand for an eligibility hearing. But we cannot expect Deiner to demonstrate his eligibility now—he requested a continuance for that purpose, and the court denied the request because of its mistaken belief that section 1001.36 did not apply retroactively to him. He has not had the chance to make a record.

The People also argue that Deiner is statutorily ineligible for mental health diversion or a suspended sentence because of his prior strikes. It is true that, under the “Three Strikes” law, defendants who have been found to have one or more prior strikes are not eligible for probation, and they must be committed to state prison— “[d]iversion shall not be granted.” (§ 667, subd. (c)(2) & (4).) “But the People misconstrue the conditional reversal procedure in *Frahs*.” (*People v. Burns*, *supra*, 38 Cal.App.5th at p. 789.) “The *Frahs* procedure conditionally reverses both the convictions and the sentence for an eligibility hearing under section 1001.36. [Citation.] Conditional reversal thus restores the case to its procedural posture before the jury verdict for purposes of evaluating [a defendant’s] eligibility for pretrial mental health diversion.” (*Ibid.*) Before the verdict, Deiner faced mere allegations of prior strikes, which were “insufficient to preclude a suspended sentence or diversion.” (*Ibid.*)

In sum, section 1001.36 applies retroactively to Deiner’s case, given that the judgment is not yet final. We conditionally reverse the judgment and remand for an eligibility hearing under section 1001.36.

## II. *New Discretion to Strike Prior Serious Felony Enhancements*

Deiner contends that we must remand for resentencing, now that Senate Bill No. 1393 (2017-2018 Reg. Sess.) gave the court discretion to strike or dismiss prior serious felony enhancements. We agree.

### A. *Additional Background*

The operative information alleged that Deiner had suffered five prior convictions for robbery qualifying as both prior strikes under the Three Strikes law and prior serious felonies under section 667, subdivision (a)(1). Three of those robbery convictions were brought and tried in the same 2008 case. The other two were brought and tried in the same 2009 case.

After the court found the prior conviction allegations true, Deiner moved the court to strike or dismiss the prior strikes under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court denied the motion and concluded that striking the priors would not be “in the furtherance of justice.” The court explained that Deiner’s criminal history included violent crimes (the robbery convictions), and the prior convictions were “not particularly old.” Deiner was on parole for some of those prior crimes when he committed the current offenses. As to the current offenses, the court observed that Deiner used a “representation of a gun,” which the victims believed to be real, and his actions “terrorized” the victims. Although no one suffered physical harm, the victims “clearly” suffered emotional trauma. And the court believed that there was potential for even greater harm—if a security guard or police officers had been at the



scenes, a shootout could have occurred. Moreover, Deiner had acted alone and appeared to have planned the robberies, rather than acting on the “spur of the moment.” All things considered, the court ruled: “I don’t see that I would use my discretion under [section] 1385 to strike any of the strikes.”

The court sentenced Deiner as follows: His convictions on counts 1 and 2 were for robbing the two employees of the Redlands bank. The court imposed a Three Strikes sentence of 25 years to life on count 1, plus another 5 years each for the two prior serious felony enhancements. (§§ 667, subds. (a)(1), (e)(2)(A)(ii).) It imposed the same sentence on count 2 but exercised its discretion to run the sentence concurrently to count 1. Deiner’s conviction on count 3 was for second degree burglary of the Redlands bank. The court sentenced him to the upper term of three years, doubled the term for the prior strikes (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)), and stayed the sentence under section 654. Deiner’s convictions on counts 4 through 6 were for robbing the three employees of the Rancho Cucamonga bank. On all of those counts, the court again imposed a Three Strikes sentence of 25 years to life, plus another 5 years each for the two prior serious felony enhancements. It ordered him to serve the count 4 sentence consecutively and the other two concurrently. The count 7 conviction was for second degree burglary of the Rancho Cucamonga bank, and the court again imposed the upper term of three years, doubled it under the Three Strikes law, and stayed the term under section 654. Lastly, on count 8, Deiner was convicted of recklessly evading officers. The court imposed the upper term of three years and doubled it under the Three Strikes law.

### B. *Necessity of Remand*

At the time of Deiner's sentencing in August 2018, the court did not have discretion to strike or dismiss the prior serious felony enhancements. (Former § 1385, subd. (b); *People v. Zamora* (2019) 35 Cal.App.5th 200, 208 (*Zamora*).) Effective January 1, 2019, Senate Bill No. 1393 amended section 667, subdivision (a), and section 1385, subdivision (b), to give courts that discretion. (*Zamora, supra*, at p. 208.) Deiner argues that this change applies retroactively to his case because his judgment of conviction was not final on the effective date of Senate Bill No. 1393, and we agree. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We therefore must remand for the court to exercise its newfound discretion and decide whether to strike one or both of the prior serious felony enhancements. (*Zamora*, at p. 208.)

The People agree that Senate Bill No. 1393 applies retroactively to nonfinal cases, but they argue that a remand in this case would be futile. We are not persuaded. Courts have declined to remand when the sentencing court “‘clearly indicated’” that it “‘would not in any event have stricken [the] . . . enhancement’ even if it had the discretion.” (*People v. Jones* (2019) 32 Cal.App.5th 267, 272-273.) “The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court’s statements and sentencing decisions to infer what its intent would have been.” (*Ibid.*)

The record here does not clearly indicate that the court would have declined to strike the subject enhancement. On the one hand, the court denied Deiner’s *Romero*

motion to strike the prior convictions for Three Strikes purposes. Those same convictions underlie the prior serious felony enhancement, and the motion to strike would be governed by the same standard as the *Romero* motion—that is, the court may strike the enhancement “in furtherance of justice.” (§ 1385, subd. (a).) In addition, the court chose the upper term for the determinate portions of Deiner’s sentence. Those choices suggest that the court would not have exercised leniency on the prior serious felony enhancement.

On the other hand, the court exercised leniency in another area. It had discretion to run the terms on counts 2, 5, and 6 concurrently or consecutively. (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Courts may consider a number of factors in making this decision, including whether “[t]he crimes and their objectives were predominantly independent of each other,” whether they “involved separate acts of violence or threats of violence,” whether the defendant committed the crimes “at different times or separate places,” and other “circumstances in aggravation or mitigation.” (Cal. Rules of Court, rule 4.425(a) & (b).) The court here chose to run the terms concurrently, citing defense counsel’s oral arguments, Deiner’s sentencing brief, and letters submitted in his support. Deiner could have faced up to 175 years to life if the court had imposed more of the terms consecutively. In light of this discretionary choice to shorten Deiner’s prison commitment, we cannot say that the record *clearly* indicates the court would have denied a motion to strike the five-year enhancements. (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 69 [in “an abundance of caution,” remanding for resentencing under Sen.

Bill No. 1393, even though the sentencing court had denied the defendants' *Romero* motions].)

For all of these reasons, we remand for the court to exercise its newly granted discretion under Senate Bill No. 1393.

### III. *Ability to Pay the Restitution Fine and Fees*

At Deiner's sentencing hearing, the court imposed the minimum restitution fine of \$300, plus \$560 in court operations and facilities fees. (§§ 1202.4, subd. (b), 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a)(1).) The court imposed those amounts over Deiner's objection that he did not have the ability to pay them. Relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157, Deiner argues that as a matter of due process, we must stay the restitution fine and fees. We decline to stay the fine and fees or remand for an ability to pay hearing. Any *Dueñas* error was harmless.

*Dueñas* held that defendants have a due process right under the federal and state Constitutions to a hearing on their ability to pay court operations and facilities fees. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) In addition, "to avoid serious constitutional questions" raised by the statutory restitution scheme, the court must stay execution of the mandatory restitution fine unless the court determines that defendants have the ability to pay it. (*Id.* at p. 1172.) The same court that decided *Dueñas* has since clarified that, at the ability to pay hearing, defendants bear the burden of showing their inability to pay, and the court "must consider all relevant factors," including "potential prison pay during

the period of incarceration to be served by the defendant[s].” (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490-491.)<sup>2</sup>

As a threshold matter, the People argue that Deiner forfeited his *Dueñas* challenge. They acknowledge that he asked the court to stay or strike the restitution fine and fees on the basis of his inability to pay. But they contend that his failure to specifically invoke due process resulted in forfeiture. The claim lacks merit. Deiner’s sentencing hearing took place before *Dueñas* was decided. “[A] due process objection would have been ‘futile or wholly unsupported by substantive law then in existence.’” (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1033 (*Jones*).) And because “*Dueñas* was unforeseeable,” we decline to find forfeiture. (*Ibid.*)

Nevertheless, Deiner’s *Dueñas* challenge fails. Assuming that the court erred by imposing the restitution fine and fees without an ability to pay hearing, the error was harmless beyond a reasonable doubt. (*Jones, supra*, 36 Cal.App.5th at p. 1035.) “[E]very able-bodied” prisoner must work while imprisoned. (§ 2700.) Wages in prison range from \$12 to \$56 per month, depending on the job and skill level involved. (Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1); see also Cal. Code Regs., tit. 15, § 3040, subd. (k) [“An inmate’s assignment to a paid position is a privilege dependent on available funding, job performance, seniority and conduct”].) Fifty percent of Deiner’s wages and

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<sup>2</sup> The California Supreme Court has granted review of the issues presented by *Dueñas* in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844. The Court will decide whether a court must “consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments,” and if so, “which party bears the burden of proof regarding defendant’s inability to pay.” (*People v. Kopp*, review granted, Nov. 13, 2019, S257844 [2019 Cal. Lexis 8371].)

trust account deposits will be deducted automatically to pay the restitution fine, plus another 5 percent for the administrative costs of that deduction. (§ 2085.5, subds. (a), (e); Cal. Code Regs., tit. 15, § 3097, subd. (f).)

According to the probation report, Deiner was 39 years old and five feet 11 inches tall and weighed 185 pounds at sentencing. He was in good health and had a high school education. Before his arrest, he worked for Better Fleet Maintenance for one and one-half years, earning \$12.50 per hour. All of that information shows that Deiner is capable of earning prison wages. He will owe \$875, including the fees (\$560), the restitution fine (\$300), and the administrative costs of deducting the fine (five percent of \$300, or \$15). He will pay off that total amount in approximately 73 months, or six years. His prison sentence far exceeds six years and will do so even if the court strikes one or both of the five-year enhancements on remand. We therefore conclude that Deiner's ability to pay the total amount with prison wages "forecloses a meritorious inability to pay argument." (*Jones, supra*, 36 Cal.App.5th at p. 1035.)<sup>3</sup>

#### DISPOSITION

The judgment is conditionally reversed. On remand, the trial court shall conduct a diversion hearing under section 1001.36. If the court determines that Deiner qualifies for

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<sup>3</sup> The People argue that the restitution fine is punitive in nature and should be analyzed under the Eighth Amendment's excessive fines clause, not the due process clause. They contend that the restitution fine is constitutional under the excessive fines clause. Moreover, they argue that even if a due process analysis applies, the fine survives rational basis review and therefore is constitutional. We need not address those arguments, given our conclusion that any error in imposing the restitution fine was harmless.

mental health diversion, the court may grant diversion and dismiss the charges if he successfully completes it. But if the court determines that Deiner is ineligible for diversion, or he does not successfully complete it, the court shall reinstate his convictions. If the court reinstates his convictions, the court shall resentence Deiner and consider whether to strike or dismiss the prior serious felony enhancements under section 667, subdivision (a)(1), and section 1385, subdivision (b).

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MENETREZ  
J.

We concur:

SLOUGH  
Acting P. J.

FIELDS  
J.